JUN 20 1944
CHARLES ELMORE CROPLEY
CLERK

No. 93

In the Supreme Court of the United States

OCTOBER TERM, 1944

W. G. CHOATE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Discussion	3
Conclusion	5

CITATIONS

Cases:	
Cullen v. *Commissioner*, 118 F. (2d) 651	4
Hogan v. *Commissioner*, 141 F. (2d) 92, pending on petition for writ of certiorari, No. 94 this Term	2, 3, 4

593356—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 93

W. G. CHOATE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Tax Court (R. 24–34) is not officially reported. The opinion of the circuit court of appeals (R. 79–83) is reported in 141 F. (2d) 641.

JURISDICTION

The judgment of the circuit court of appeals was entered March 13, 1944 (R. 83–84). Motion for rehearing was denied April 8, 1944 (R. 94). Petition for a writ of certiorari was filed May 23, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a transfer in 1938 of an interest in a producing oil and gas leasehold together with the equipment thereon, for a cash consideration and the retention of an overriding royalty, was a sublease resulting in ordinary income under Section 22 (a) of the Revenue Act of 1938, as the Commissioner contends, or a sale giving rise to capital gain under Section 117 of the Act, as the petitioner contends.

2. Whether the undepreciated cost of equipment accompanying the leasehold may be deducted by the taxpayer from the cash consideration for purposes of computing net income for 1938.

STATUTE AND REGULATIONS INVOLVED

The pertinent sections of the statute and regulations are set forth in the Appendix to our brief in opposition to the petition for a writ of certiorari in *Hogan* v. *Commissioner of Internal Revenue*, No. 94 this Term.

STATEMENT

This case is a companion to *Hogan* v. *Commissioner of Internal Revenue*, No. 94 this Term. The two cases were tried on a single record in the Tax Court, and disposed of by that court in a single opinion. A full statement of the pertinent facts will be found in our brief in opposition to the petition in No. 94. The Tax Court made precisely the same disposition of the claims of

petitioner here as it made of the identical claims of his partner, Fred T. Hogan, the petitioner in No. 94.

In No. 94 the Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the Tax Court on both issues presented, thereby deciding the first question stated above in favor of the Commissioner and the second question stated above in favor of the taxpayer Hogan. The petition therein is limited to the first question. In the instant case, the appeal was taken to the Circuit Court of Appeals for the Tenth Circuit, which affirmed the decision of the Tax Court in favor of the Commissioner on the first question, but reversed the Tax Court's decision in favor of the petitioner on the second question, and accepted the contention of the Commissioner that the unrecovered cost of the equipment could not be deducted from the cash consideration received. The petition for a writ of certiorari herein seeks review of the decision below on both questions.

DISCUSSION

In so far as the petition for a writ of certiorari seeks review of the determination that the transfer of the leasehold constituted a sublease resulting in ordinary income under Section 22 (a) of the Revenue Act of 1938, the petition should be denied. On this issue there is no conflict of authorities, and the decision below rests upon uniformly accepted principles of law established long

since by this Court and by it frequently reiterated. The question is the same as that involved in No. 94, and for a discussion of the pertinent considerations and authorities we refer the Court to our brief in opposition to the petition for a writ of certiorari in that case.

With respect to the proper treatment of the equipment transferred with the leasehold, however, the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Hogan* case is in plain conflict with the decision review of which is here sought. The two circuit courts of appeals have reached diametrically opposite conclusions on the same set of facts. While it is true that the majority opinion below relied upon an earlier Fifth Circuit decision, *Cullen* v. *Commissioner*, 118 F. (2d) 651, and accordingly purported to decide this case in conformity with the view adopted in the Fifth Circuit, the Fifth Circuit Court of Appeals itself in the *Hogan* case declined to follow the *Cullen* case. Since the dissenting judge in the court below referred to the opinion in the *Hogan* case, decided about two weeks earlier, it must be assumed that that opinion was available to the court below, and that the conflict of decisions was deliberate. We are advised that the question is a recurring one, and that although the sum in controversy in this case and the *Hogan* case is not large, there is likelihood of further litigation on the same issue which in the

aggregate may well involve very substantial amounts. Accordingly, on this issue we do not feel justified in opposing the issuance of a writ.

CONCLUSION

If the second question presented by the petition, with respect to which a conflict of authorities exists, is deemed by this Court to be of sufficient importance to warrant the issuance of a writ of certiorari, it is respectfully submitted that the writ should be limited to that question.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
MARYHELEN WIGLE,
CHESTER T. LANE,
Special Assistants to the Attorney General.

JUNE 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944